UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MIGUEL A. CLAROS, ET AL.,	:	
Petitioners,	:	
	:	Civil Action No. 3:02CV1308CFD)
v.	:	
	:	
STEVEN J. FARQUHARSON, ET AL.,	:	
Respondents.	:	

RULING

Pending is the petitioners' petition for writ of habeas corpus and review of asylum petition. For the following reasons, the petition is DENIED.

I. Background

Petitioners Miguel A. Claros Pena ("Claros"), his wife Lita N. Gomez de Claros, and their children, Mabel K. Claros Gomez and Angel S. Claros Gomez, are natives and citizens of Peru. On November 4, 1996, Claros and his wife entered the United States in Miami, Florida, using non-immigrant visas that permitted them to stay in the United States for not more than six months. Their children entered the United States on December 22, 1996, also using non-immigrant visas allowing a six-month stay. Petitioners overstayed their visas and remained illegally in the United States.

On July 21, 1997, the Immigration and Naturalization Service ("INS") initiated removal proceedings against the petitioners pursuant to a Notice to Appear. The notice charged petitioners with removability under Section 237(a)(1)(B) of the Immigration and Nationality Act ("INA"). On October 30, 1998, a hearing was held before an Immigration Judge. At that hearing, the petitioners admitted all allegations and conceded removability, but sought asylum and withholding of removal based on Claros'

past persecution while working as a police officer in Peru. At the hearing, the petitioners presented Claros' testimony and submitted documents concerning his alleged persecution in Peru.

According to Claros, he was a police officer in Peru from 1988 through 1996. Claros was assigned to guard the president of Peru, Dr. Allen Garcia Perez. After President Perez was ousted from office, Claros continued to work for the police force and was assigned by the Peruvian government to protect former President Perez and also the Peruvian Minister of Economics. On one occasion, Claros assisted Perez in evading a detail of the Peruvian army that had been ordered to arrest Perez. Claros maintained that the Peruvian government knew of his loyalty to former President Perez and subsequently retaliated against him on that basis.

In that connection, Claros maintains that he was sent by the Peruvian government to serve as a police officer in the "terrorism zones" in Peru. Though most police officers were assigned to the terrorism zones only on one occasion because of the dangerous conditions there, Claros claims that he was sent on multiple occasions. Claros testified that the terrorists, particularly the revolutionary movement of Tupac Amaru (hereinafter "MRTA"), targeted police officers patrolling those terrorism zones. Claros also stated that in 1994 and 1996, after his terrorism zone duties, he and his family received death threats from persons he believed to be associates of MRTA. He reported these incidents to the police, but claims that he was never given any protection by the Peruvian government or police.

Fearing danger for himself and his family, Claros fled Peru. However, Claros did not advise the United States Consulate in Peru of his threat when he applied for visitors' visas for himself and his family. Nor did he or his family apply for asylum upon their entry into the United States.

Claros believes that, if returned to Peru, he would again be assigned to the terrorism zones and would be targeted by the MRTA. Claros also claims that he would be prosecuted and sent to jail for two years for abandoning his position as a police officer. Claros owns a home in Peru and many of his relatives, including his mother and siblings, still reside in Peru. Three of his brothers work for the police force in Peru.

At the conclusion of the hearing, the Immigration Judge issued a decision denying petitioners' request for asylum and withholding of removal. The Immigration Judge found that Claros did not meet his burden of establishing past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Accordingly, the Immigration Judge found, by clear and convincing evidence, that the petitioners were deportable as charged and issued an order allowing them to voluntarily depart the United States by December 29, 1998.

Petitioners timely appealed the decision of the Immigration Judge to the Board of Immigration Appeals ("BIA"). On June 28, 2002, the BIA affirmed the Immigration Judge's decision, without opinion, and ordered that the petitioners voluntarily depart within thirty days of the date of the order. On July 12, 2002, the INS District Director issued a Notice of Action requiring petitioners to voluntarily depart the United States by July 28, 2002. On July 29, 2002, the petitioners filed the instant habeas petition.

The petition argues that the BIA's dismissal of the petitioners' appeal without opinion was a gross miscarriage of justice and deprived the petitioners of their rights to substantive due process, procedural due process, and equal protection. In their response to the petition, the respondents claim

that (1) habeas jurisdiction does not exist in this case because the petitioners are not and have never been in federal or INS custody; (2) habeas jurisdiction does not exist because no questions of law are raised by the petition; and (3) the petitioners were not deprived of any constitutional rights by the BIA's summary affirmance of the Immigration Judge's decision. At the hearing on the petition and in a subsequently-filed brief, the respondents also argued that the petitioners have not exhausted their administrative remedies because they did not raise the instant claims in their appeal to the BIA, and that the Court lacks jurisdiction to review the BIA's decision to summarily affirm the petitioners' appeal.

II. Discussion

A. Custody Requirement

The general habeas corpus statute, 28 U.S.C. § 2241, confers federal jurisdiction over claims that an individual is being held "in custody in violation of the Constitution or laws ... of the United States." § 2241(c)(3). In the context of INS removal proceedings, courts have "broadly construed 'in custody' to apply to situations in which an alien is not suffering any actual physical detention; i.e., so long as he is subject to a final order of deportation, an alien is deemed to be 'in custody' for purposes of the INA, and therefore may petition a district court for habeas review of that deportation order." Nakaranurack v. United States, 68 F.3d 290, 293 (9th Cir.1995) (citations omitted); see also Miranda v. Reno, 238 F.3d 1156, 1158-59 (9th Cir. 2001), cert. denied, 534 U.S. 1018 (2001); Mendonca v. Reno, 52 F. Supp. 2d 155, 158 (D. Mass. 1999) (citing Almon v. Reno, 13 F.Supp.2d 143, 144 n. 2 (D. Mass.1998) (noting that "custody" under § 2241 "does not necessarily mean physical custody" and that "[t]he term 'in custody' has been broadly construed [for purposes of the INA] to apply to situations in which an alien is not suffering any actual physical detention, ... so long as he is subject to a final order

of deportation")); Then v. INS, 37 F.Supp.2d 346, 354 n. 8 (D.N.J.1998) (same).

Here, the petitioners are not in physical custody of the INS; they state that they reside in Hartford, Connecticut. However, a final order of deportation has been issued against them and their period of voluntary departure expired on the day before they filed their habeas petition. Accordingly, though the petitioners are not in the physical custody of the INS, they are nonetheless "in custody" for the purposes of § 2241 because they are subject to a final order of deportation. See Grigous v. Aschcroft, No. 3:02CV1440(CFD) (D. Conn. March 28, 2003).

B. Exhaustion of Administrative Remedies

An alien must exhaust all administrative remedies "available as of right" before he or she seeks review of a final order of removal. See 8 U.S.C. § 1252(d)(1); Barton v. Ashcroft, 171 F. Supp. 2d 86, 91 (D. Conn. 2001). This exhaustion requirement is jurisdictional in nature. See Mejia-Ruiz v. INS, 51 F.3d 358, 362 (2d Cir.1995) (under former 8 U.S.C. § 1105a(c) (1988)); see also Townsend v. United States Dept. of Justice (INS), 799 F.2d 179, 181 (5th Cir.1986) ("[w]hen exhaustion is statutorily mandated, the requirement is jurisdictional"). Courts have excepted petitioners from the exhaustion requirement based on futility, commenting that neither an immigration judge nor the BIA is permitted to consider constitutional claims and thus raising such issues at those stages would be futile. See, e.g., Barton, 171 F. Supp. 2d at 91-92.

Here, the petitioners claim that they were denied due process and equal protection in the removal proceedings and BIA appeal. As to the removal proceedings, the petitioners claim that the Immigration Judge (1) interrupted Claros' testimony numerous times during his direct examination and forced Claros to omit important information, (2) "sidetracked" Claros and petitioners' attorney during

the direct examination, (3) was biased against petitioners' attorney, (4) openly discredited Claros' testimony while Claros was on the witness stand, (5) interrupted petitioners' attorney and pressured him with time constraints and unduly prevented proper presentation of the petitioners' case, but did not so treat counsel for the INS, (6) conducted his own direct and cross examination of Claros, (7) alerted counsel for the INS to proper objections, (8) failed to resolve objections made as to the quality of the translation of Claros' testimony, and (9) improperly applied the Federal Rules of Evidence. The petitioners contend that the BIA "condoned the Immigration Judge's unfair removal hearing" by dismissing the appeal without opinion. Additionally, the petitioners contend that the BIA's decision to "streamline" their case violated due process and equal protection.[1]

A review of the petitioners' notice of appeal, amended notice of appeal, and appeal brief reveals that petitioners failed to raise in their BIA appeal any issue regarding the IJ's manner of conducting the removal proceedings. Nor do petitioners argue that they lacked the opportunity to raise such claims. Rather, the petitioners contend that such claims are "embedded" in their arguments that Claros adequately established his claim of persecution. The Court disagrees and finds that the petitioners did not properly raise the issues of the IJ's actions with the BIA. Furthermore, the BIA was not required to "search the record sua sponte for potentially meritorious claims." United States v. Gonazalez-Roque, 301 F.3d 39, 47 (2d Cir. 2002).

The petitioners contend, however, that the exhaustion requirement does not apply because their claims are constitutional in nature and could not have been raised before the BIA. The Second Circuit

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[1]"Streamlining," in general, refers to a single member of the BIA summarily approving an IJ decision, without opinion. See discussion infra.

recently addressed this issue:

> While constitutional claims lie outside the BIA's jurisdiction, it clearly can address procedural defects in deportation proceedings. The issues raised by Gonzalez-Roque--whether the INS erred in failing to locate the I-130 form and whether the IJ abused his discretion by refusing to adjourn the proceedings to consider it-are essentially procedural. Gonzalez-Roque's claim is that those errors rose to a constitutional level because the IJ's refusal to further adjourn proceedings deprived him of the opportunity to present evidence essential to his adjustment of status application. But Gonzalez-Roque cannot evade BIA review merely by labeling the claim a due process claim.

Gonzalez-Roque, 301 F.3d at 47-48 (citing Vargas v. U.S. Dept. of Immigration, 831 F.2d 906, 908 (9th Cir. 1987)) ("[A] petitioner cannot obtain review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process. 'Due process' is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal.").

Here, as in Gonzalez-Roque, the petitioners claim that the manner in which the IJ conducted the removal proceedings violated their constitutional rights. Specifically, as noted above, the petitioners claim that the IJ interfered with Claros' testimony and his counsel's presentation of the case, failed to resolve objections, and improperly applied the Federal Rules of Evidence. As in Gonzalez-Roque, these claims are essentially procedural. See Gonzalez-Roque, 301 F.3d at 48; see also Mendes v. INS, 197 F.3d 6, 12 (1st Cir. 1999) (finding claim that immigration judge improperly shifted burden of proof in deportation proceedings to petitioner in violation of due process required exhaustion, inasmuch as alleged burden shifting was procedural error that BIA could have addressed). The BIA could have reviewed petitioners' claims of procedural error and lack of opportunity to present their case, and "reopen[ed] the proceedings and . . . allow[ed] the petitioner to supplement the record with additional

evidence," notwithstanding that the BIA could not have reviewed a constitutional claim. Gonzalez-Roque, 301 F.3d at 48 (internal quotations and citation omitted). Accordingly, the Court lacks jurisdiction to review the petitioners' unexhausted claim concerning the manner in which the IJ conducted the removal proceedings.

However, the petitioners' claim that the BIA violated their due process and equal protection rights in summarily affirming, or "streamlining," their appeal does not require exhaustion. The petitioners appear to make two related claims as to this issue. First, that the BIA summary affirmance procedures violate due process and equal protection (a "facial" challenge), and second, that the BIA's decision to "streamline" the petitioners' appeal here violated due process and equal protection (an "as applied" challenge). Neither claim could have been raised at the time of the BIA appeal. Accordingly, exhaustion is not required as to either and the Court will address these claims below.

C. Standard for Habeas Jurisdiction

Section 242(a)(2)(B) of the Immigration and Naturalization Act states that courts lack jurisdiction to review the discretionary decisions of the Attorney General. See 8 U.S.C. § 1252(a)(2)(B) (providing that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review ... any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title"). However, this Court has jurisdiction to review the BIA's decision pursuant to the general habeas corpus statute, 28 U.S.C. § 2241. See INS v.. St. Cyr, 533 U.S. 289, 314 (2001); Kuhali v. Reno, 266 F.3d 93, 99 (2d Cir. 2001).

Section 2241 provides that "[w]rits of habeas corpus may be granted by the Supreme Court,

any justice thereof, the district courts and any circuit judge within their respective jurisdictions." The jurisdictional bar in section 242 of the INA "does not explicitly mention a repeal of habeas jurisdiction and therefore does not deprive a federal court of its habeas jurisdiction under 28 U.S.C. § 2241 with respect to criminal aliens challenging final orders of removal." Kuhali, 266 F.3d at 99 (citations omitted); see also St. Cyr, 533 U.S. at 314 ("we conclude that habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA"). Indeed, as the Second Circuit stated in Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir. 2000), aff'd, 533 U.S. 348 (2001):

> had Congress intended to strip federal courts of habeas jurisdiction under 28 U.S.C. § 2241 over criminal aliens' statutory and constitutional challenges, it would have done so by making its intent explicit. Because the permanent rules do not mention a repeal of 28 U.S.C. § 2241 or habeas jurisdiction generally, we hold that they do not deprive a federal court of its habeas jurisdiction under § 2241 to review the purely legal claims of criminal aliens against final orders of removal.

232 F.3d at 343 (citations omitted).

However, the court's jurisdiction under section 2241 is limited. The Court may review purely legal statutory and constitutional claims. See Sol v. INS, 274 F.2d 648, 651 (2d. Cir. 2001) (holding that "[w]hile review of purely legal issues does not necessitate reconsideration of the agency's factual findings or the Attorney General's exercise of her discretion," review of a petition contending that the decisions of the IJ and the BIA lacked adequate support in the record "would involve precisely such reassessment of the evidence") (internal quotation marks omitted); see also Soto v. Ashcroft, No. 00 Civ. 5986, 2001 U.S. Dist. LEXIS 13787, at *12 n. 3 (S.D.N.Y. Sept. 10, 2001) ("[N]either AEDPA nor IIRIRA repealed general federal habeas jurisdiction under 28 U.S.C. § 2241 to entertain

challenges to INS removal decisions raising pure questions of law.").[2] Accordingly, this Court has jurisdiction to hear the petitioners' claim that the BIA's summary affirmance violated their due process and equal protection rights.

D. Merits of Petitioners' Claim

As noted above, the petitioners claim that the BIA's summary affirmance denied them substantive due process, procedural due process, and equal protection. The petitioners do not set forth particularized bases for the different claims, but rather, argue generally that the BIA's actions deprived them of each of these constitutional rights.

A single board member of the BIA is authorized to affirm, without opinion, the results of an immigration judge's decision where that Board member determines:

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[2]The court's authority to review factual determinations is "exceedingly narrow." See Deng v. McElroy, 10 Fed. Appx. 10, 12 (2d Cir.2001) (giving "particular deference to the credibility determinations of the IJ") (internal quotation marks omitted); Mu-Xing Wang v. Ashcroft, No. 3:01CV1353, 2001 U.S. Dist. LEXIS 21245, at * 15 (D.Conn. Dec. 7, 2001) ("[Section] 2241 does not vest this Court with the authority to review credibility determinations made by the IJ or to reweigh the evidence.") (citations omitted). The court may only determine whether factual determinations are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Perez v. Chater, 77 F.3d 41, 46 (2d Cir.1996) (citations omitted). By contrast, a direct appeal of a BIA decision to the Second Circuit Court of Appeals affords review of the factual determinations under the "substantial evidence" standard. See Diallo v. INS, 232 F.3d 279, 287 (2d Cir. 2000) ("We review the factual findings underlying the BIA's determination that an alien has failed to sustain his or her burden of proof to qualify for asylum or withholding of deportation under the substantial evidence standard. Such findings must be upheld if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole.") (internal citations and quotation marks omitted). Here, the petitioners did not seek direct review by the Second Circuit.

The instant petition does not appear to claim that the BIA's decision lacked factual support. However, to the extent this is claimed, using the habeas standard for review of factual determinations, the Court concludes that the decisions of the Immigration Judge and BIA are adequately supported by the administrative record.

> that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

8 C.F.R. § 3.1(a)(7)(ii). The First Circuit recently held that the BIA's summary affirmance procedures do not violate due process.[3] See Albathani, 318 F.3d at 375. In Albathani, a native and citizen of Lebanon sought asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). Like the petitioners in the instant case, Albathani's claims for relief were denied by an immigration judge and the BIA summarily affirmed that decision in accordance with 8 C.F.R. § 3.1(a)(7). Albathani claimed, inter alia, that the BIA summary affirmance procedure violates due process.

In response to Albathani's assertions, the First Circuit noted that "an alien has no constitutional right to any administrative appeal at all." Id. at 376. The court also found that the BIA's affirmance provides reasoned bases for the BIA's decision, because reviewing courts have the reasoning of the BIA in the immigration judge's opinion. Id. at 377-78. Finally, the court was not willing to infer from statistics regarding the number of cases reviewed by individual BIA members under the summary affirmance regulation that such cases are not given adequate review. Id. at 378. For the same reasons, this Court declines to find that the BIA's summary affirmance procedures *on their face* violate due

[3]The United States District Court for the District of Columbia also recently held that the BIA's amended "streamlining" regulations, effective September 25, 2002, which authorize the expanded use of streamlining, are not arbitrary or capricious in violation of the Administrative Procedure Act. See Capital Area Immigrants' Rights Coalition v. United States Dep't of Justice, —F. Supp.2d—, 2003 WL 21196684 (D.D.C. May 21, 2003).

process or equal protection.

The Court also finds that the BIA's summary affirmance *of the petitioners' case* did not deprive them of their rights to substantive or procedural due process or equal protection. First, though the petitioners argue that the BIA's summary affirmance did not allow for the Immigration Judge's procedural errors to be reviewed, as noted above, the record reveals that the petitioners did not raise their procedural claims before the BIA. Accordingly, the BIA could not have reviewed such claims.

Additionally, the Court finds that the BIA's summary affirmance afforded the petitioners adequate review of their appeal because the Immigration Judge's decision below contains sufficient reasoning and evidence for the denial of the petitioners' claims.[4] See Arango-Arandondo v. INS, 13 F.3d 610, 613 (2d Cir. 1994) ("We join our sister circuits in upholding a summary affirmance by the BIA when the immigration judge's decision below contains sufficient reasoning and evidence to enable us to determine that the requisite factors were considered."). In concluding that Claros did not establish past persecution or a well-founded fear of future persecution, the IJ apparently reasoned that, though Claros may have established that he would be prosecuted by the Peruvian police if returned to Peru, Claros did not establish that he would be sent to the terrorism zones or otherwise persecuted by the Peruvian government if he was returned. There is sufficient evidence in the record to support this conclusion.

Therefore, the Court declines to find that the BIA's actions were "arbitrary, conscience-shocking, or oppressive in a constitutional sense," and thus violated substantive due process, see

[4]Accordingly, the Court need not reach the Government's remaining argument that the BIA's decision to streamline the petitioners' appeal is discretionary and therefore unreviewable.

Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995), or that the BIA's actions were so unfair that they deprived the petitioners of procedural due process, see Rojas-Reyes v. INS, 235 F.3d 115, 124 (2d Cir. 2000) ("In immigration cases, the Due Process Clause requires only that an alien receive notice and a fair hearing where the INS must prove by clear, unequivocal, and convincing evidence that the alien is subject to deportation.") (internal quotation marks omitted). Additionally, the Court finds that the record does not reveal any basis for a finding that the BIA treated the petitioners differently than similarly situated persons, and thus violated equal protection. Accordingly, the Court finds that the BIA's summary affirmance did not deny the petitioners substantive or procedural due process or equal protection.

III. Conclusion

For the foregoing reasons, the petition for habeas corpus and review of asylum petition are DENIED.

SO ORDERED this _____ day of July 2003, at Hartford, Connecticut.

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CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE